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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, NOVEMBER 6, 2002

APPLICATION OF

OLD DOMINION ELECTRIC COOPERATIVE

CASE NO. PUE-2002-00003

For approval of a certificate of
public convenience and necessity
for electric generating facilities

FINAL ORDER

On December 28, 2001, Old Dominion Electric Cooperative ("Old Dominion" or the "Cooperative"), acting as the sole and managing member of Marsh Run Generation, LLC ("Marsh Run"), filed an application with supporting testimony and exhibits with the State Corporation Commission ("Commission").¹ The application requests that the Commission grant the Cooperative a certificate of public convenience and necessity ("Certificate") pursuant to § 56-265.2 of the Code of Virginia ("Code") to construct an approximately 696 megawatt natural gas-fired, single cycle electric generation facility in Fauquier County, Virginia (the "Facility").

The Commission entered an order in this matter on February 7, 2002, requiring Old Dominion to provide public notice of its application, assigning a Hearing Examiner to

¹ On February 25, 2002, the Cooperative filed supplemental testimony and exhibits pertaining to its application. On March 21, 2002, Old Dominion filed a motion to admit an omitted attachment and additional information. The Hearing Examiner granted this motion on April 10, 2002.

conduct further proceedings, and establishing a procedural schedule in this matter.

On March 21, 2002, the Piedmont Environmental Council ("PEC") filed a request to be granted status as a respondent. The Cooperative filed a motion for denial of this request on April 16, 2002. On April 18, 2002, PEC withdrew its request.

On March 22, 2002, Columbia Gas of Virginia, Inc. ("Columbia Gas"), filed a notice of participation as a respondent.

The Fauquier County Board of Supervisors filed comments in support of the Facility on March 27, 2002.

The Department of Environmental Quality ("DEQ") coordinated an environmental review of the application by DEQ and other interested state agencies, the regional planning commission, and Fauquier County, Virginia. The DEQ prepared a report on the potential impacts to natural resources from construction and operation of the Facility, as well as recommendations for minimizing those impacts ("DEQ Report"), which was filed on April 3, 2002.

On April 18, 2002, the Commission Staff ("Staff") filed direct testimony regarding its analysis of the Cooperative's application. The DEQ Report was attached to the testimony filed by Staff.

Old Dominion filed rebuttal testimony on May 6, 2002.

An evidentiary hearing was held on May 21, 2002, before Hearing Examiner Michael D. Thomas, with John A. Pirko, Esquire, James Patrick Guy II, Esquire, and T. Borden Ellis, Esquire, appearing on behalf of Old Dominion, M. Renae Carter, Esquire, appearing on behalf of Columbia Gas of Virginia, Inc. ("Columbia Gas"),² and Katharine A. Hart, Esquire, appearing on behalf of the Staff.

Thirteen public witnesses testified in favor of the Facility, and one public witness spoke in opposition.³

Old Dominion presented the testimony of four witnesses: (1) Mr. Kenneth F. Alexander, Vice President of Asset Development and Production for Old Dominion, who testified regarding the construction, ownership structure, and operation of the Facility; (2) Mr. Peter F. Gallini, Director of Power Supply for Old Dominion, who described how the Cooperative determined that the Facility was the best option to meet the Cooperative's demand; (3) Mr. David N. Smith, Manager of Environmental Licensing and Compliance for Old Dominion, who testified as to the environmental permitting and licensing process, as well as to the environmental impacts of the

² A Stipulation regarding the supply of natural gas to the proposed facility entered into by Columbia Gas and Old Dominion was filed May 20, 2002. The Staff did not object to the Stipulation.

³ The Hearing Examiner's Report issued August 22, 2002, summarizes each witness' testimony.

Facility; and (4) Mr. Paul F. Greywall of Trinity Consultants, Inc., who addressed the current levels of air quality and any cumulative impacts of the Facility and other existing or proposed facilities.

The Staff presented the testimony of three witnesses:

(1) Mr. Marc A. Tufaro, Assistant Utilities Analyst with the Commission's Division of Energy Regulation, who addressed the Facility's impact on rates, reliability of regulated service, and technical viability; (2) Ms. Mary E. Owens, Principal Financial Analyst with the Commission's Division of Economics and Finance, who testified regarding Old Dominion's financial ability to construct the Facility; and (3) Mr. Jarilaos Stavrou, Principal Research Analyst with the Commission's Division of Economics and Finance, who described Old Dominion's load forecast and resource plan, addressed the economic impacts from construction, and evaluated whether the Facility is in the public interest.

On August 22, 2002, the Hearing Examiner entered a Report summarizing the record, and analyzing the evidence and issues in the May 22, 2002, proceeding. The Hearing Examiner determined that Marsh Run, rather than Old Dominion, is the legal entity that should hold the Certificate. The Hearing Examiner found that Marsh Run is the entity that is borrowing the money, paying

the cost of construction, and will own the Facility, while Old Dominion is supervising the construction and will operate it.

In his Report, the Hearing Examiner recommends that the Commission enter an order adopting his findings and grant approval, pursuant to § 56-580 D of the Code, to Marsh Run to construct and operate the Facility after certain requirements were met. The Report included the following findings:

(1) The [Facility] will have no material adverse effect on reliability;

(2) The [Facility] will have no material adverse effect on competition;

(3) The [Facility] will have no material adverse effect on retail electric, natural gas, water, or sewer rates;

(4) The [Facility] will have no material adverse effect on any threatened or endangered plant or animal species, any wetlands, air quality, water resources, or the environment generally;

(5) The [Facility] will have no material adverse effect on economic development;

(6) The [Facility] will have no material adverse visual impact on the surrounding area;

(7) There is insufficient evidence in the record to determine whether the [Facility], and its associated facilities, may have a material adverse effect on cultural resources, and

thereby, the public interest. The Commission should require Old Dominion to file with the Commission a copy of the plan of avoidance that it filed with the Virginia Department of Historic Resources ("VDHR"), and, pursuant to § 56-580 D of the Code, as amended, the Commission should obtain VDHR's concurrence in the plan of avoidance;

(8) The [Facility's] use of fuel oil is not contrary to the public interest;

(9) The Commission should incorporate the Stipulation entered into between Old Dominion and Columbia Gas in any Certificate issued in this case; and

(10) The Commission should include a sunset provision in any Certificate issued in this case that the Certificate will expire if construction has not commenced within two years from the date of issuance.

On September 12, 2002, Old Dominion filed comments on the Hearing Examiner's Report generally supporting his recommendations, but providing comment on two issues. First, Old Dominion does not believe that it is necessary or appropriate to require Old Dominion to file the plan of avoidance of cultural or historic resources that it filed with VDHR with the Commission as well. Old Dominion also does not believe that the Commission obtaining VDHR concurrence with the plan is necessary or appropriate. In support of its comments,

Old Dominion indicates that it readily accepts the recommendation contained in the DEQ Report that Old Dominion "[c]onsult with [VDHR] to complete the review and mitigation of any impacts to historic structures or archeological resources." Old Dominion states that it has been working with VDHR and will continue to cooperate fully in locating, identifying, and either avoiding or mitigating any impact on such resources. The Cooperative notes that it must do so in order to secure VDHR's approval of the Facility. Old Dominion requests that the Commission condition the certificate on obtaining the VDHR's approval, rather than adopt the Hearing Examiner's recommendation.

Second, Old Dominion maintains that the certificate should be issued in the name of Old Dominion, not Marsh Run as suggested by the Hearing Examiner.⁴ Old Dominion argues that Old Dominion is the applicant in this proceeding and is the entity relied on to provide the expertise and financial support for the construction and operation of the Facility. The Cooperative states that a certificate of public convenience and necessity obtained pursuant to § 56-580 D of the Code is for the

⁴ In support of its argument, Old Dominion cites Application of Old Dominion Electric Cooperative, For a certificate for electric generation facilities in Louisa County, Case No. PUE-2001-00303, Final Order (July 17, 2002), where a certificate of public convenience and necessity was issued to Old Dominion to construct and operate a facility in Louisa which would be owned by Louisa Generation, LLC.

construction and operation of an electric generation facility. The Cooperative argues that § 56-580 D of the Code does not address the ownership of the facility.

In response to a request by the Staff, on October 18, 2002, the DEQ filed a letter pursuant to § 10.1-1186.2:1 C of the Code ("DEQ Letter"). Among other things, this Code section requires that, prior to the close of the Commission's record on an application for certification of an electric generating facility pursuant to § 56-580 of the Code, the DEQ shall provide the Commission with certain information about environmental issues identified during the review process. The DEQ Letter stated, among other things, that all issues identified during the DEQ's review process are addressed in the above mentioned DEQ Report.

NOW THE COMMISSION, having considered the record, the pleadings, the Hearing Examiner's Report, and the applicable law, is of the opinion and finds that the Hearing Examiner's findings and recommendations, except as modified herein, should be adopted.

Old Dominion requested the Certificate, will supervise and be responsible for the construction, and will operate the Facility. We find, therefore, that Old Dominion should be granted authority and the Certificate to construct and operate the Facility.

As we have indicated in previous orders,⁵ the Code establishes six general areas of analysis applicable to electric generating plant applications: (1) reliability;⁶ (2) competition;⁷ (3) rates;⁸ (4) environment;⁹ (5) economic development;¹⁰ and (6) public interest.¹¹ We have evaluated the Facility according to these six areas.

Pursuant to § 56-580 D of the Code, we find that the Facility will have no material adverse effect upon reliability of electric service provided by any regulated public utility. We further find that the Facility is not otherwise contrary to the public interest in that, among other things, rates for the regulated public utility will not be impacted.

We have given consideration, pursuant to §§ 56-46.1 A and 56-580 D of the Code, to the effect of the Facility on the environment. Effective July 1, 2002, §§ 56-46.1 A and 56-580 D

⁵ See, e.g., Tenaska, Case No. PUE-2001-00039, Final Order (April 19, 2002); Application of Old Dominion Electric Cooperative, For a certificate of public convenience and necessity for electric generation facilities in Louisa County, Case No. PUE-2001-00303, Final Order (July 17, 2002).

⁶ Va. Code Ann. §§ 56-46.1 A and 56-580 D (i).

⁷ Va. Code Ann. § 56-596 A.

⁸ Va. Code Ann. §§ 56-580 D (ii). See also 20 VAC 5-302-20 14; Ex Parte: In the matter of amending filing requirements for applications to construct and operate electric generating facilities, Case Nos. PUE-2001-00313 and PUE-2001-00665, Order Adopting Rules and Prescribing Additional Notice at 6 (Dec. 14, 2001).

⁹ Va. Code Ann. §§ 56-46.1 A and 56-580 D.

¹⁰ Va. Code Ann. §§ 56-46.1 and 56-596 A.

¹¹ Va. Code Ann. §§ 56-580 D (ii).

of the Code provide that, among other things, any valid permit or approval regulating environmental impact and mitigation of adverse environmental impact, "whether such permit or approval is granted prior to or after the Commission's decision," shall be deemed to satisfy the requirements of §§ 56-46.1 A and 56-580 D of the Code "with respect to all matters that (i) are governed by the permit or approval or (ii) are within the authority of, and were considered by, the governmental entity in issuing such permit or approval, and the Commission shall impose no additional conditions with respect to such matters."

In this regard, Old Dominion is in the process of obtaining the environmental permits and approvals necessary for the construction and operation of the Facility. The DEQ Letter explains that two of the recommendations contained in the DEQ Report "could" be governed by Virginia Water Protection Permits ("VWPPs").¹² The DEQ Letter asserts that "[w]hether and to what extent these recommendations become permit conditions depends on the interaction between the issuing authority and the Department of Game and Inland Fisheries, which developed the recommendations and which interacts directly with the permitting authority in the permit process."

¹² These recommendations involve (1) precautions for in-stream work, and (2) conducting a habitat assessment.

Based on the DEQ Letter, all of the environmental issues identified in the DEQ's review are contained in the DEQ Report. There have been no other issues raised in this case. We will require Old Dominion to comply with the recommendations in the DEQ Report, excluding the two recommendations discussed above. It is clear that these two enumerated recommendations are within the authority of, and are being considered by, the permitting agency; pursuant to §§ 56-46.1 A and 56-580 D of the Code, the Commission shall impose no additional conditions with respect to such matters. We also will not adopt the Hearing Examiner's recommendation with regard to the plan of avoidance of cultural and historic resources. Rather, we will require Old Dominion to obtain approval from the VDHR of its plan as a condition of the Certificate.

Accordingly, IT IS ORDERED THAT:

(1) Pursuant to § 56-580 D of the Code, Old Dominion is hereby granted authority and a Certificate to construct and operate the Facility described in this proceeding.

(2) The Certificate granted herein shall be conditioned upon the receipt of all environmental and other permits necessary to construct and operate the Facility.

(3) As a condition of the Certificate granted in this case, Old Dominion shall comply with the recommendations made by DEQ in the DEQ Report filed in this proceeding, except for the

recommendations regarding (a) precautions for in-stream work, and (b) conducting a habitat assessment.

(4) As a condition of the Certificate granted in this case, Old Dominion shall obtain approval from the VDHR of its plan for avoidance of cultural and historic resources.

(5) The Certificate granted herein shall expire in two years from the date of this order, if construction of the Facility has not commenced.

(6) The Stipulation entered into between Old Dominion and Columbia Gas is hereby approved and adopted.

(7) There being nothing further to come before the Commission in this proceeding, this case shall be removed from the docket and the papers transferred to the file for ended causes.

MOORE, Commissioner, Concurs:

Given the statutory change effective July 1, 2002, I concur with my colleagues in the decision to approve construction and operation of the proposed facility. While the necessary permits from other agencies have not been issued, as reflected in the order, there appears to be nothing further for this Commission to consider. I continue to be extremely concerned that the environmental studies, analyses, and reviews prior to the issuance of permits and approvals may not be adequate or as

thorough as they should be.¹ If the studies, analyses, and reviews of the state are inadequate, Virginia may suffer unnecessarily, causing harm not only to the environment, but to the health of the citizens and the economy of the Commonwealth.

¹ Examples of areas where, based on the record before the Commission, additional analysis and study should be required are discussed in my prior concurrences and dissents. See Commissioner Moore concurrence, *Application of CPV Cunningham Creek LLC, For approval of a certificate of public convenience and necessity pursuant to Va. Code §56-265.2, for an exemption from Chapter 10 of Title 56, and for the interim authority to make financial expenditures*, Case No. PUE-2001-00477, Final Order (October 7, 2002); Commissioner Moore concurrence, *Application of Old Dominion Electric Cooperative, For a certificate of public convenience and necessity for electric generation facilities in Louisa County*, Case No. PUE-2001-00303, Final Order (July 17, 2002); Commissioner Moore dissent, *Application of Buchanan Generation, LCC, For permission to construct and operate an electrical generating facility*, Case No. PUE-2001-00657, Final Order (June 25, 2002) ("Buchanan, Moore dissent"); Commissioner Moore dissent, *Application of Tenaska Virginia Partners, L.P., For approval of a certificate of public convenience and necessity pursuant to Virginia Code §56-265.2, an exemption from Chapter 10 of Title 56, and interim approval to make financial commitments and undertake preliminary construction work*, Case No. PUE-2001-00039, Final Order (April 19, 2002) ("Tenaska, Moore dissent").

This case presents another example based on the data and explanations provided to the Commission. The most critical area in this proceeding appears to be ozone where the current background ozone concentration level in the area of the proposed plant is already at 120 ppb, which is equal to the present NAAQS for ozone. Ozone concentration levels under the more stringent revised standard were not provided although it was stated that the area would be in attainment under both standards, assuming future NO_x Sip Call reductions that may occur. There is no safe level of ozone, and exceedences under the revised standard (eight-hour, 80 ppb) have been more than fifteen times greater statewide than under the one-hour standard (one-hour, 120 ppb). See *Tenaska*, Moore dissent at 6-8 and *Buchanan*, Moore dissent at 3-4. Given these facts and the current ozone level in the area, more data should be provided and analyzed, and the impacts of ozone on the health of people and the environment should be studied and considered carefully before the Commonwealth decides whether to approve the construction and operation of the proposed facility.